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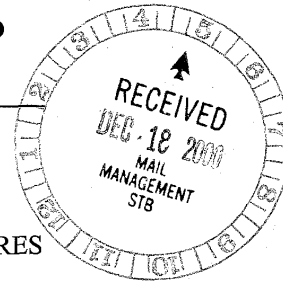
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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

Notice of Proposed Rulemaking



JOINT REPLY COMMENTS OF CERTAIN COAL SHIPPERS

Offer Tail Power Company ("OTP"), Public Service Company of Colorado ("PSCo"), Southwestern Public Service Company ("SPS") (PSCo and SPS being operating divisions of Xcel Energy Inc. and doing business as Xcel Energy), TUCO INC. ("TUCO"), Tucson Electric Power Company ("TEP"), and Western Resources, Inc. ("Western") (referred collectively herein as "Joint Commenters"), hereby submit the following comments in reply to comments filed by interested parties in response to the Board's Notice of Proposed Rulemaking ("NOPR") in this proceeding.

In their Comments submitted in response to the ("NOPR") on November 17, 2000 ("Joint Comments"), Joint Commenters stressed, as they did previously in comments submitted in the Advanced Notice of Proposed Rulemaking ("ANPR") stage of this proceeding, that rail-to-rail competition has been reduced by prior major rail mergers, and that this reduction in competition has been accompanied by an overall deterioration of rail service in the United States as the rail industry has continued to consolidate. Joint Comments at 1. This view is consistent with the testimony and comments submitted by hundreds of interested parties in Ex Parte No. 582, *Public Views on Major Rail Consolidations*, and in response to the ANPR. The reduction of

competition and corresponding deterioration of rail service has been very prevalent in the coal transportation segment of the industry. *Id.*

Accordingly, Joint Commenters applauded the Board's conclusion in the ANPR that the Board needed to revise its merger rules to not only preserve rail-to-rail competition, but also to enhance it. Joint Commenters also supported the STB's conclusion that merger applicants should be held to a higher standard during and after the merger application process in asserting purported post-merger service levels and operating plans. However, Joint Commenters criticized the NOPR for being generally too vague, and for excluding without comment all of the specific suggestions of rail shippers made in response to the Board's request for such suggestions in the ANPR. The primary points raised in Joint Commenters' initial Comments are summarized below:

1. Joint Commenters asked the Board to clarify the NOPR to state that the STB's merger policy will be to enhance, rather than preserve, intramodal competition in considering whether to approve a major rail merger. *Id.* at 8-12;
2. Joint Commenters repeated their prior plea that the Board must review and amend its regulations other than just those that specifically apply to major railroad mergers, so as to avoid the creation of an unbalanced railroad industry by enhancing competition and improving rail service only in the context of rail mergers. *Id.* at 12-13;
3. Joint Commenters made several other specific suggestions for modifications and additions to the NOPR as written, including:
 - a. Requiring merging railroads to provide, upon request, rates over bottleneck railroad segments that are either (1) created by the merger; or (2) pre-existing on the merging railroads' systems;
 - b. Eliminating the so-called "one lump" theory;
 - c. Eliminating the "same origin" restriction that deters the ability of captive coal shippers to obtain bottleneck rates (absent a competitive access case) where the bottleneck railroad and the non-bottleneck railroad serve the same mine origin;

- d. Requiring merging railroads to provide bottleneck rates even if no contract has been entered into for transportation over the non-bottleneck segment;
- e. Establishing specific remedies in the event that rail service declines after a merger, including the substitution of an alternative railroad on grounds that are more lenient than those in existence today;
- f. Requiring merging railroads to provide reciprocal switching and/or trackage rights at established rate levels from established terminal points to facilities physically connected to only one major railroad; and
- g. Ensuring the viability and independence of short line, regional and smaller Class I railroads to serve as competitive alternatives to major Class I railroads for coal transportation.

As demonstrated below, the above themes, and others, consistently appear in the comments filed in response to the NOPR. Such suggestions should therefore receive serious consideration by the Board as it works to finalize the proposed rules.

I. The Views of Joint Commenters are Shared By Many Parties to This Proceeding

- A. There is Widespread Agreement That Intramodal Competition Has Been Reduced and the Opportunities to Restrict Competition Have Increased as the Rail Industry Has Consolidated

Since the STB's commencement of its review of rail merger rules and policy in January of 2000 by instituting Ex Parte No. 582, rail shippers and other interested parties have filed testimony and comments describing how the consolidation of the rail industry, beginning most noticeably with the merger of the Burlington Northern Railroad Company and The Atchison, Topeka & Santa Fe Railway Company, has resulted in the reduction of competition in the rail industry, which in turn has resulted in the deterioration of rail service generally. This theme continues to resonate in the comments filed in response to the NOPR.¹

¹ See Comments of Ag Processing Inc at 3; Comments of The National Industrial Transportation League at 5-6; Comments of the Alliance for Rail Competition at 1-2; Comments of Ameren Services Company at 2; Comments of Bunge Corporation at 3-4 (foreclosure of routes); Comments of Committee to Improve American Coal Transportation at 6-10; Comments of National Grain and Feed Association at 3. ("what has really been eliminated by rail mergers, and by the last few in particular, has been competition."); Comments of IMC Global Inc. at 3;

B. Numerous Parties Support the Board's Policy Shift to Focus on the Need for "Enhanced Competition"

In large part proceeding from the above belief that past mergers have resulted in the reduction of intramodal competition and the deterioration of rail service, but also looking to prevent potential harms that further consolidation of the rail industry can be expected to cause, rail shippers and other interested parties concur in their support for the conceptual change in policy direction articulated in the ANPR toward enhancing rail-to-rail competition, rather just continuing to attempt to preserve pre-existing competition.²

C. Almost All Parties Agree that the Proposed Rules are Too Vague

However, the support of Joint Commenters and other parties commenting on the proposed rules, whether they are shippers, railroads or other interested parties, is tempered by the almost universally held conclusion that the NOPR as written is impermissibly vague. Specifically, the NOPR does not provide meaningful standards that merging railroads can rely upon when preparing a merger application, nor does it enable parties affected by a proposed merger to evaluate whether to expend valuable resources to participate a merger proceeding in

Comments of PPL Generation, LLC at 2. ("Since 1980, the level of intramodal competition faced by the major railroads has declined precipitously."); Comments of U.S. Department of Agriculture at 5-6; and Comments of Subscribing Coal Shippers at 9-10.

² See Comments of American Forest Resource Council at 2; Comments of The National Industrial Transportation League at 5; Comments of Alliance for Rail Competition at 2; Comments of House Transportation Committee of the Commonwealth of Pennsylvania at 1; Comments of Port of Houston Authority at 5; Comments of Ohio Rail Development Commission at 2; Comments of Ag Processing Inc. at 2; Comments of Ameren Services Company at 2; Comments of Committee to Improve American Coal Transportation at 10; Comments of Enron Corporation at 1; Comments of State of New York at 6; Comments of New York City Economic Development Corporation at 3; Comments of North Dakota Public Service Commission, et al at 2; Comments of PPG Industries, Inc. at 1; Comments of Oklahoma Department of Transportation at 2-3; Comments of Consumers United for Rail Equity at 9; Comments of U.S. Department of Transportation at 1, 3; Comments of American Chemistry Council / American Plastics Council at 2 ("the proposed rules in general represent a positive change in direction."); Comments of Weyerhaeuser Company (rules are a potential "good start") at 3; Comments of U.S. Department of Agriculture at 14 ("USDA applauds the Board for placing much more emphasis upon enhancing competition.").

order to protect their interests.³ This is a fundamental, and perhaps fatal flaw of the NOPR as written.

D. Many Rail Shippers and Other Interested Parties Have Suggested Specific Means to Strengthen the NOPR to Facilitate the Enhancement of Intramodal Competition.

While believing that the NOPR as currently drafted is inadequate to provide interested parties with sufficient guidance as to if, when and how intramodal competition would be enhanced as a result of a particular merger, Joint Commenters and others have nevertheless sought to assist the Board by submitting specific suggestions for provisions to include in the final rule to enable the policy goals of the STB to be achieved.⁴

³ See, e.g., Comments of The National Industrial Transportation League at 10-14 (“the proposed rules are so vague as to provide neither shippers nor carriers with clear notice of what is required . . .”); NS Comments at 29 (the STB’s provisions regarding enhancement of competition “are so open-ended and so vaguely defined as to provide virtually no meaningful guidance”); Comments of Procter & Gamble Company at 1, 3; Comments of Kansas Dept of Transportation and Kansas Corporation Commission at 3 (need for “certainty and predictability”); Comments of American Farm Bureau Federation at 2 (Board must add “meaningful, objective standards on which the Board will evaluate . . . merger applications.”); Comments of National Grain and Feed Association at 4-6 (call for “explanatory guidelines”); Comments of Committee to Improve American Coal Transportation, p. 10. (the rules are “silent as to how [enhancing competition] is to be done”); Comments of Greater Houston Partnership at 3 (“STB did not specify the methods by which railroads must provide for enhanced competition in their merger applications”); Comments of IMC Global Inc. at 1 (the proposed rules are “exceedingly vague and [are] lacking in accountability.”); Comments of North Dakota Public Service Commission, et al at 6 (the Board should “provide details that will help minimize the need for further interpretive action by the Board or the Courts.”); Comments of PPG Industries, Inc. at 1 (the proposed rules “are too general in nature and fall short by failing to outline specific requirements in key areas.”); Comments of PPL Industries, LLC at 7-12; Comments of American Short Line and Regional Railroad Association at 1-2; Comments of Edison Electric Institute at 5; Comments of U.S. Department of Transportation at 1, 3 (“the NRPM offers little guidance as to what types of proposals would meet the Board’s requirements, and how extensive such measures would have to be . . . we believe that concrete examples and additional guidance should be offered to indicate the types of arrangements that should be pursued.”); Comments of American Chemistry Council/American Plastics Council at 2 (the rules “do not set any objective standards for evaluating mergers”); Comments of U.S. Department of Agriculture at 13 (“there is a lack of specificity in the rules . . .”); CN Comments at 8 (provisions regarding enhancing competition would confer “tremendous administrative discretion and corresponding uncertainties in the private sector.”).

⁴ See Comments of Canadian Pulp and Paper Association at 2-3; Comments of The National Industrial Transportation League at 18-19 (maintain open gateways); Comments of Ameren Services Company at 3 (elimination of paper barriers); Comments of Committee to Improve American Coal Transportation at 11; Comments of National Grain and Feed Association at 4; Comments of State of New York at 8-9 (be more pro-active in rail-to-rail competition) and at 15-16 (rebuttable presumption of removal of paper barriers); Comments of IMC Global Inc. at 1; Comments of PPL Industries, LLC at 15-16 (elimination of paper barriers); Comments of Subscribing Coal Shippers at 13 (the Board should “prescribe, in advance, pro-competitive conditions . . .” which would include trackage rights access, bottleneck relief, paper barrier relief, etc.); Comments of U.S. Department of Transportation at 4 (reciprocal switching in terminal areas); Comments of CURE at 6-7.

E. Need for Greater Competition In the Railroad Industry Generally

Finally as to the policy goal of enhancing competition, Joint Commenters and other parties agree that, in order to achieve the policy goals stated in the ANPR of improving service in the railroad industry and enhancing rail-to-rail competition, the Board must not only revise its so-called "merger rules," but it must also revise its regulations pertaining to rail service and competition outside of the merger context. To not conduct a broader review and modification of the Board's rules could very well lead to undesired results from a public policy standpoint, such as establishing disincentives for railroads to merge at all because to do so would expose the merging railroads to regulatory responsibilities that non-merging railroads would not be subject to.⁵

F. The Need to Strengthen Service Assurance Plans by Adopting Specific Remedies for Post Merger Service Failures

The need for greater accountability on the part of merging railroads to their customers for the deterioration of rail service after a merger has been stressed to the STB time after time by rail shippers and other parties since the advent of the UP service crisis in the spring of 1997. Indeed, the deterioration of rail service was a key reason for the Board's institution of the Ex Parte No. 582 hearings. *See* Ex Parte No. 582, *Public Views on Major Consolidations* (Served January 24, 2000) at 2-3 ("In particular, we note that a majority of the large railroads have recently stated that now is the time to concentrate on existing opportunities to improve service rather than on further consolidation. And, other parties have expressed concern about more restructuring while

⁵ Comments of The National Industrial Transportation League at 15-18; Comments of Procter & Gamble Co. at 4; Comments of House Transportation Committee of Commonwealth of Pennsylvania at 2 (competitive access for regional and short lines); Comments of Greater Houston Partnership (STB should use authority to establish competitive terminal access); Comments of IMC Global Inc. at 6; Comments of Port of Pascagoula at 9-10; Comments of Subscribing Coal Shippers at 11; Comments of CURE at 3-5; Comments of Edison Electric Institute at 7-9; Comments of U.S. Department of Transportation at 5 (in the context of open gateways) and at 6, (rail access question "should be the subject of a separate, industry-wide, rulemaking."); Comments of Weyerhaeuser Company at 4-5.

the industry is still recovering from service difficulties and other disruptions associated with implementation of the last round of major rail consolidations.”). Beginning with the hearings held in Ex Parte 582, and later in response to the ANPR in Ex Parte No. 582 (Sub-No.1), a voluminous record has been assembled that (1) demonstrates widespread concern exists over service problems that are likely to occur with the next major rail merger and (2) contains many requests that the Board take specific steps that will ensure that the serious service problems of the past will not be repeated. Given the level of concern expressed by the Board, rail shippers, other interested parties, and even the Class I railroads in Ex Parte No. 582 and in response to the ANPR, Joint Commenters and many other parties believe the NOPR as written is too open ended and vague regarding the consequences for merging railroads who fail to live up to their promises regarding rail service upon which approval of their merger will be based.⁶

⁶ See, Comments of National Industrial Transportation League at 21-22 (“service assurance plans must include provisions for the compensation of shippers in the event that promised service levels degrade from those experienced prior to the merger.”); Comments of The Procter & Gamble Company at 6, 7; Comments of U.S. Clay Producers Traffic Association at 4; Comments of Ohio Rail Development Commission at 3; Comments of BASF Corporation at 16; Comments of California Public Utilities Commission at 5; Comments of Committee to Improve American Coal Transportation at 12; Comments of National Grain and Feed Association at 11-12; Comments of Greater Houston Partnership (“sanctions” should be imposed for service failures) at 4; Comments of IMC Global Inc., p. 4 (“there should be meaningful and enforceable penalties if the promised service improvements do not materialize”); Comments of North Dakota Public Service Commission, et al at 2; Comments of PPG Industries at 3; Comments of Oklahoma Department of Transportation at 11 (“the Board’s regulations should . . . require prompt reimbursement to both shippers and short lines for demonstrable service-related losses”); Comments of Edison Electric Institute at 9 (the Board must “impose financial penalties on railroads who fail to provide appropriate service as a result of a merger.”); Comments of U.S. Department of Transportation at 9 (“any service assurances or guarantees should provide some form of compensation . . . if applicants fail to maintain the promised minimum level of service. . . . [and the Board should] provide shippers, small railroads, Amtrak, and commuter authorities a self-executing mechanism for obtaining relief and/or compensation.”); Comments of U.S. Department of Agriculture at 18-19 (merging carriers should “reimburse those harmed by transitional service disruptions.”); Comments of Weyerhaeuser Company at 7 (“any future mergers [must] have reasonable and realistic penalties on the merged carrier for [service] failures”); Comments of Farmrail Systems, Inc. at 9 (“the regulations should require that applicants . . . make prompt reimbursement to shippers and connecting short lines for demonstrable service-related losses.”); Comments of Subscribing Coal Shippers at 12, 20.

II. The Class I Railroads' Collective Response to the Overwhelming Record Evidence and Testimony is to "Just Say No" to Enhanced Intramodal Competition and to Accountability for Service Problems

A. Enhanced Rail-to-Rail Competition

In contrast to the many comments and suggestions of Joint Commenters and other interested parties who responded to the NOPR by seeking to constructively build upon and facilitate the achievement of the STB's basic policy goals stated in the ANPR and the NOPR, the comments of the Class I Railroads on the NOPR's provisions regarding rail competition⁷ can be summarized in the phrase "just say no." In the face of substantial testimony to the contrary by their customers, the current lukewarm (at best) opinion of railroads as a whole held by Wall Street, increasing concern over the industry on the part of Congress and the Department of Transportation, and the STB's own negative statements regarding the state of the rail industry,⁸ the Class I railroads continue to cling desperately to the flawed premise that there is nothing wrong in the railroad industry from a competitive standpoint that would warrant a change in the STB's policies concerning rail-to-rail competition. Consequently, the Class I railroads have taken the position in response to the NOPR that all of the testimony and comments critical of the state of competition in the rail industry in the record of this proceeding and Ex Parte No. 582 should be completely ignored, and that the STB is simply wrong to even consider a policy change that would contemplate the enhancement of rail-to-rail competition, as the result of a merger or otherwise. Although each has its own explanation for this position, at bottom the Class I railroads have all asked the Board simply to maintain the status quo, *i.e.* to continue to try

⁷ The Class I railroads acknowledge that the NOPR's provisions regarding "enhancement of competition" are vague, but they appear to have adopted an interpretation of the phrase to mean enhancement of rail-to-rail competition for purposes of their comments on the NOPR. *See, e.g.* NS Comments at 6-7.

⁸ In Ex Parte No. 582, the STB stated that recent consolidations "regrettably have been accompanied by a number of serious service problems and . . . service is clearly not where it should be. Promised customer benefits have not yet been fully realized, and carrier relationship with customers, rail employees, and local communities have

to mitigate specific merger-related competitive harms on a case-by-case basis. See NS Comments at 23. KCS Comments at 8, 12 (“chief guiding principal” should be to preserve the level of pre-merger rail service options available to shippers.);⁹ BNSF Comments at 38-30 (“It is not appropriate to require that rail mergers enhance competition.” (emphasis in original); CN Comments at 5, 7 (CN opposes requirements that “would go beyond preserving competition . . .”); CSX Comments at 43; UP Comments at 12-13 (Agreeing with the AAR that the Board “went too far in requiring competition-enhancing concessions that do not address specific anti-competitive effects of a proposed merger.”); and AAR Comments at 3, 10-11.

All of the Class I railroads’ comments on the enhancement of rail competition seek to justify and support this basic position that the status quo should not be changed.¹⁰ Joint Commenters urge the STB to reject the railroads’ refusal to budge off of “square one,” and urge the STB to press forward with revisions to the NOPR taking into consideration the comments of those industry participants who offered constructive criticisms and suggestions to help effectuate the Board’s revised merger policy.

been strained.” Ex Parte No. 582, *Public Views on Major Rail Consolidations*, (decision served March 16, 2000) at 3.

⁹ KCS, because of its past opposition to the UP/SP merger, must admit “it is undeniable that certain past mergers have resulted in the loss of rail-to-rail competition.” KCS Comments at 17. However, even KCS joins the other Class I railroads and states that the STB’s merger policy “should leave no doubt” that the preservation of rail-to-rail competition, not its enhancement, should be the focus of the Board in weighting the merits of a proposed rail consolidation. *Id.* at 8.

¹⁰ One of the complaints of the AAR and its members is that to enhance intramodal rail competition would substitute regulation for “the market,” as if the rail industry were a competitive, thriving market similar to telecommunications or automobiles or computers. See, e.g., AAR Comments at 4-7; CN Comments at 10. However, the “market” they describe is nothing of the sort. Rather, it is an amalgam of separate markets controlled by regional rail duopolies, in which the railroads do not engage in competition at a fraction of the level present in other industries, and where many rail shippers do not have any rail alternatives, let alone competitive rail alternatives. Moreover, in this “market” certain market participants, such as short lines and regional carriers, are barred from participating for market share by anti-competitive paper and steel barriers. Finally, the lack of a competitive rail alternative for many shippers, *i.e.* a market based solution to bad service and high rates, means that a prerequisite for participation in the “market” is *regulatory* relief, in the form of prescribed rates, rail buildouts and crossing proceedings, and the like. In addition, “market solutions” for poor service in the absence of competition are often limited to litigated solutions.

B. Service Assurance Plans and Post-Merger Monitoring

While not as entrenched as their stance on enhancing rail-to-rail competition, the Class I railroads' respective reactions to the NOPR's proposal to require merger applicants to supply more information in their application and be accountable for post merger service problems fall far short of what is required to achieve the desired policy objective of anticipating and preventing the deterioration of rail service after a major rail merger. In general, the Class I railroads do not object to submitting more data about pre-consolidation service levels related information. *See e.g.*, CN Comments at 5; UP Comments at 9-11. However, none of the Class I railroads is agreeable to the promulgation of regulations that would hold merging railroads responsible to their customers for failing to achieve the purported service benefits of their merger. CN Comments at 5; KCS Comments at 21; BNSF Comments at 51 (expressing support for the NOPR as written, which contains no specific remedies or penalties); CSX Comments at 56 (a merged railroad should be permitted to "work through" service difficulties "without having to debate its managerial decisions in a forensic encounter with third parties"); NS Comments at 48-49; *See also*, Joint Reply Comments of Certain Coal Shippers in response to ANPR at 5 (critiquing UP's proposed remedies for service deterioration).

NS, CSX, UP and KCS have apparently forgotten how adamant their respective CEOs were in their testimony before the Board in Ex Parte No. 582 of "how difficult merger implementation can be, even with the best planning and with the experiences of prior mergers to guide them." Ex Parte No. 582, *Public Views on Major Rail Consolidations* (served March 17, 2000) at 4-5. The concerns expressed by the leaders of these four Class I railroads are exemplified by the testimony submitted by Norfolk Southern's David R. Goode, in which he stated:

I have to admit that the restructuring of the U.S. rail industry, particularly during the large consolidations of the past decade, has been disruptive to the industry and to our customers. For a variety of reasons, which include the strains on physical infrastructure from growing traffic volumes and the size and complexity of recent major rail consolidations, recent transactions have been more difficult and time-consuming to implement than prior ones.

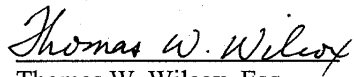
Statement of David R. Goode, submitted in Ex Parte No. 582 (February 29, 2000) at 5. Since it is a given that the next rail merger will be larger in scope than prior consolidations, it is not unreasonable for the Board to expect that the problems Mr. Goode described will be magnified. It is therefore entirely reasonable for the STB to promulgate specific regulations designed to prevent the serious problems of the past from being repeated. To do otherwise would be contrary to the public interest. Yet, NS has proposed that the STB adopt perhaps the least intrusive Service Assurance Plan rules proposed by any major carrier, urging that representations of post-merger operations and performance be considered merely nonbinding "good faith estimates," NS Comments at 43, and that an SAP be treated as "an evolving, organic document which is continually revised and updated as traffic and market conditions change, merger implementation proceeds, and unanticipated developments or problems arise." NS Comments at 47. Given the severity of the service problems accompanying the last few major rail mergers, and the accompanying tremendous harm to the national economy and individual shippers while the merging railroads attempted to fix their problems, there is absolutely no justification for accepting this and the other Class I railroads' positions of not being held more accountable for post-merger service failures.

III. Conclusion

In conclusion, the STB should seriously consider the specific suggestions of Joint Commenters and others to clarify and strengthen the NOPR to achieve the salutary goals of

enhancing rail-to-rail competition and ensuring that future rail mergers do not result in a repeat of the service crises of the past and present. The STB should reject the concerted attempt of the Class I railroads to maintain the status quo in the face of overwhelming evidence that the status quo is seriously flawed.

Respectfully submitted,

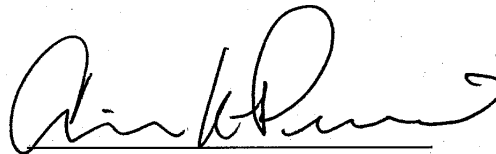
A handwritten signature in cursive script that reads "Thomas W. Wilcox".

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December 18, 2000

CERTIFICATE OF SERVICE

I hereby certify that I have served on this 18th day of December, 2000 a copy of the above
JOINT REPLY COMMENTS OF CERTAIN COAL SHIPPERS by first class mail postage pre-paid, to all
parties of record.



Aimee DePew